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Facebook Firings and Twitter Terminations: The National Labor Relations Act as a Limit on Retaliatory Discharge

Bryan Russell

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FACEBOOK FIRINGS AND TWITTER TERMINATIONS:
THE NATIONAL LABOR RELATIONS ACT AS A LIMIT ON
RETALIATORY DISCHARGE

Bryan Russell^{*}

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ABSTRACT

In every state except Montana, at-will employment is the default rule, leaving employers free to discharge employees for their use of social media. The National Labor Relations Act's (NLRA) protection of collective action, however, is emerging as a substantial limitation to at-will terminations. In Hispanics United of Buffalo, the National Labor Relations Board concluded that Facebook posts critical of the non-profit employer were protected as collective action and that the employer's retaliatory termination of five employees violated Section 8 of the NLRA. To be protected as collective action under the NLRA, an employee's use of social media must be "concerted," somehow involving other coworkers, and for the purpose of mutual aid. The employee may lose this protection if her words or conduct are opprobrious, insubordinate, or disloyal as to disrupt the work environment. Furthermore, an employer remains free to terminate the employee for other legitimate reasons unrelated to collective action. Finally, an employer may not distribute or enforce a social media policy which chills or potentially chills collective action.

^{*} Bryan Russell, University of Washington School of Law, Class of 2013. Thank you to my student editor, Luke Rona, for his enduring patience and thoughtful critiques, and to my faculty advisor, Professor Lea Vaughn, for her valuable feedback and guidance.

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INTRODUCTION

Social media permeates the American workplace. Access to social networks has expanded through the use of cell phones, personal computers, netbooks, work stations, and every device in between. Employees use these platforms to communicate with their coworkers, manage projects, send data, organize presentations, and accomplish tasks related to their employment. Employees also use these platforms to harass, complain, and slander their employer, potentially threatening a company's good will, culture, reputation, and bottom line.

Unsurprisingly, harassment, complaining, and slander can serve as a basis for termination. Unless otherwise negotiated, at-will employment is the default rule, and employees may be terminated for their use of social media. However, if an

employee's use of social media constitutes collective action under the National Labor Relations Act (NLRA), she may be protected from termination.

The National Labor Relations Board (NLRB) has applied existing legal concepts to emerging issues concerning social media use. In analyzing whether an employee's use of social media is protected, the NLRB still determines whether there is concerted activity and whether an employee is fired in violation of the NLRA. Generally, "[t]he legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough."¹ In extending its traditional protections for collective action to social media, the NLRB has looked to established legal principles and case law. As described in the 1953 case *NLRB v. Local Union No. 1229, IBEW*, "The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge."² With social media, whether an employee was terminated for collective action or some other independent reason remains a nuanced determination of fact.

This Article will first outline, in Section I, the controlling law for establishing collective action and determining whether protection has been lost. Section II will enumerate and analyze cases in which the employees' conduct was deemed concerted activity. Section III will examine cases where the employees' actions fell outside the scope of the NLRA's protection. Section IV discusses how employers can use precedent to create a viable social media policy. The Article concludes with practice pointers for both employers and employees.

I. THE BLACK LETTER LAW: PROTECTIONS FOR COLLECTIVE ACTION UNDER THE NATIONAL LABOR RELATIONS ACT

Because the NLRA's statutory language does not address use

¹ *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464, 475 (1953).

² *Id.*

of social media, the NLRB has applied existing case law addressing employees' right to engage in concerted activity to decide emerging issues associated with social media use. Section 7 of the NLRA states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."³ Section 8 of the Act enforces these rights by prohibiting employers from engaging in unfair labor practices. Namely, an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."⁴ Consequently, to be protected under the NLRA, an employee's action must be (1) concerted and (2) for the purpose of mutual aid or protection.

Concerted activities include those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself,"⁵ as well as those made by "individual employees seek[ing] to initiate or to induce or to prepare for group action."⁶ Mutual aid and protection refers to the underlying purpose of the Act to allow "employees to band together in confronting an employer regarding the terms and conditions of their employment."⁷

This protection can be lost if the employee's conduct is opprobrious, insubordinate, or disloyal to the point of disrupting the work environment.⁸ To determine whether an employee has lost NLRA protection, the NLRB has distinguished between an employee outburst made to the employer (or supervisor) and those made to third parties, such as the press or general public.⁹ For outbursts made against or to a supervisor, the NLRB applies a

³ National Labor Relations Act, 29 U.S.C. § 157 (2006).

⁴ *Id.* at § 158(a)(1).

⁵ *Meyers*, 268 N.L.R.B. 493, 497 (1984).

⁶ *Meyers Inds., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986).

⁷ *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984).

⁸ *NLRB v. Local Union No. 1229*, 346 U.S. 464, 475 (1953); *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816-817 (1979); *Will & Baumer Candle Co., Inc.*, 206 N.L.R.B. 772, 774 (1973).

⁹ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011).

four-factor balancing test to determine whether an employee has crossed this line, considering: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.”¹⁰ For outbursts directed to third parties, the NLRB analyzes whether the outburst is protected as “part of an appeal for support in the pending dispute,” or whether the outburst constitutes an unprotected “separable attack purporting to be made in the interest of the public rather than in that of the employees.”¹¹

With Facebook and Twitter, the relevant legal issue is still whether the employee engaged in collective action for the purpose of mutual aid, and subsequently, whether such protection is lost based on the severity of the employee's conduct. The following sections will discuss key cases from the recent *Report of the Acting General Counsel Concerning Social Media Cases*, and the underlying facts and reasoning in cases where the employee's conduct was held to be protected as concerted activity under the NLRA.¹²

II. EXAMPLES OF DISCHARGES PROHIBITED BY THE NLRA

In determining whether an employee's use of social media is protected under the NLRA as concerted activity, the NLRB focuses its inquiry on the two main elements of collective action: activity that is (1) group-related and (2) for mutual aid. Recognizing the potential utility for employees to organize with and through social media, the NLRB hinges protection on whether the employee's actions related to previous or prospective group

¹⁰ Atlantic Steel Co., 245 N.L.R.B. at 816 (1979).

¹¹ Local Union No. 1229, IBEW, 346 U.S. at 477; OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 8-9 (2011).

¹² On August 18, 2011, Acting General Counsel for the NLRB released to the public its REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) to discuss “emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules.”

activity related to terms or conditions of employment. In the following cases, the Administrative Law Judge (“ALJ”) held that the employees’ conduct was protected as collective action under the NLRA.

A. Prospective Collective Action: Facebook Discussion of Employment Terms and Conditions

The clearest example of protected collective action using social media is *Hispanics United of Buffalo*,¹³ where an ALJ held that an employee’s Facebook post and subsequent comments from coworkers were protected as concerted activity. Hispanics United of Buffalo (“HUB”) employee Mariana Cole-Rivera posted on Facebook, “Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?”¹⁴ Some of Cole-Rivera’s fellow coworkers responded by commenting on the post, asking questions and voicing support.¹⁵ The next day, the acting manager fired five employees for disloyalty, citing the Facebook conversation as the reason.¹⁶

In satisfying the concerted element, the ALJ explained that “[i]ndividual action is concerted so long as it is engaged in with the object of initiating or inducing group action The object of inducing group action need not be express.”¹⁷ Cole-Rivera’s express request for opinions from her coworkers met this standard. With respect to mutual aid, the ALJ reasoned that complaints about terms and conditions need not be first directed to a supervisor or the employer.¹⁸ Furthermore, exchanges among only coworkers

¹³ *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520, at *10 (N.L.R.B. Div. of Judges Sept. 2, 2011).

¹⁴ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 3-5 (2011); *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520, at *9 (N.L.R.B. Div. of Judges Sept. 2, 2011).

¹⁵ *Hispanics United of Buffalo*, 2011 WL 3894520, at *10.

¹⁶ *Id.* at *12.

¹⁷ *Id.* at *16 (citing *Whittaker Corp.*, 289 N.L.R.B. 933 (1988) and *Mushroom Transp. Co., Inc., v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

¹⁸ *Id.* (citing *Aroostook Cnty. Reg’l Ophthalmology Ctr.*, 317 N.L.R.B. 218, 220 (1995) enf. denied on other grounds 81 F. 3d 209 (D.C. Cir. 1996)).

were deemed sufficient to warrant protection, even if the intent to change conditions is not apparent.¹⁹ Finally, the ALJ concluded that the employees had not lost protection due to opprobrious conduct.²⁰

B. Outgrowth of Collective Action: Facebook Criticisms of Employer's Event

In *Karl Knauz Motors, Inc.*,²¹ an employee criticized his employer (a car dealership) for providing meager food and beverages for a sales event. The employee's critical photos and accompanying comments on Facebook were protected because they were "a direct outgrowth of the earlier discussion among the salespeople that followed the meeting with management."²² Based on this conclusion, the NLRB found the employee's lone conduct was protected as the logical outgrowth of collective action.²³

In terms of mutual aid and protection, the NLRB found the employee's Facebook comments and photos of an event directly influenced the sales staff's commissions and livelihoods.²⁴ In addition to the photos and critical comments posted on Facebook about the sales event, the employee also posted online photos and comments about a crashed vehicle at a nearby competitor.²⁵ The NLRB concluded that this latter conduct did not relate to mutual aid or protection and did not constitute collective action.²⁶ Thus, there existed an independent basis for termination. Because the employee was fired for inappropriately mocking a competitor, the NLRB held that the termination did not violate the NLRA.²⁷

This case indicates that an employee's use of social media must first stem from prior action, or relate to prospective collective

¹⁹ *Id.*

²⁰ *Id.* at *20-21 (citing *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979)).

²¹ No. 13-CA-46452, 2011 NLRB LEXIS 554, at *8 (Sept. 28, 2011).

²² OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 8 (2011).

²³ *Karl Knauz Motors*, 2011 NLRB LEXIS 554, at *22.

²⁴ *Id.* at *5.

²⁵ *Id.* at *10.

²⁶ *Id.* at *27.

²⁷ *Id.* at *35.

action, to be protected under the NLRA. Secondly, the use must relate to mutual aid or protection. Lastly, the use of social media cannot be so opprobrious that protection is lost. While “collective” and “mutual aid or protection” are read broadly, this analysis and protection under the NLRA does not extend to independent reasons for discharge.

III. EXAMPLES OF UNPROTECTED EMPLOYEE CONDUCT

The NLRB explicitly notes the employer’s legitimate interest in preserving confidential information and managing good-will, reputation, and customer relations. The NLRA does not protect employee actions that do not relate to group activity or pertain to terms or conditions of employment. Protection is not warranted if either of these elements is not satisfied. Even in cases of protected collective action, statutory protection can be lost through disloyal or disallowed behavior. In line with this reasoning, the following cases provide examples where the NLRB found that the employee’s conduct was not protected as collective action.

A. *Employee’s Activity Was Neither Concerted nor for Mutual Aid*

In *Lee Enterprises, Inc., d/b/a Arizona Daily Star*, a reporter posted on Twitter that “[t]he Arizona Daily Star’s copy editors are the most witty and creative people in the world. Or at least they think they are.”²⁸ A week later, a managing editor told the employee that he was “prohibited from airing his grievances or commenting about the Daily Star in any public forum.”²⁹ Thereafter, the employee continued to use his social media account to post such comments as, “You stay homicidal, Tucson,” “What?!?!? No overnight homicide? WTF? You’re slacking Tucson,” and “Hope everyone’s having a good Homicide Friday.”³⁰ The NLRB concluded that the reporter was terminated for these latter comments. The tweets³¹ neither related to the terms

²⁸ No. 28-CA-23267, 2011 NLRB GCM LEXIS 17, at *4 (Apr. 21, 2011).

²⁹ *Id.* at *5.

³⁰ *Id.* at *5-6.

³¹ “Tweet” refers to a comment published on Twitter, which is then

and condition of his employment nor sought to involve other employees in employment-related issues.³² Therefore, the comments were not protected under the NLRA.³³

B. Mere Reference to Terms and Conditions of Employment is Not Concerted Action

In the *Report of the Acting General Counsel Concerning Social Media*, general counsel for the NLRB noted a case where a bartender criticized the employer's tipping policy on Facebook.³⁴ Although the terminated employee had a conversation with a coworker a few months prior, neither that conversation nor the Facebook post was an outgrowth of former or prospective action.³⁵ The bartender's post did not constitute collective activity because it was not an outgrowth of the conversation with the coworker and did not relate to any meeting involving other employees or management.³⁶

C. "Individual Gripes, Not Concerted Activity"

An employee's post of "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!" was not protected under the Act.³⁷ The NLRB noted that nothing on the record, including supportive comments from coworkers, tied the posts to prior or subsequent group activity.³⁸

viewable by followers of the account. Twitter, <https://support.twitter.com/articles/15367-how-to-post-a-twitter-update-or-tweet#> (last visited July 25, 2012).

³² Lee Enterprises, Inc., d/b/a Arizona Daily Star, No. 28-CA-23267, 2011 NLRB GCM LEXIS 17, at *4 (Apr. 21, 2011).

³³ *Id.*

³⁴ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 14 (2011).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Walmart, No. 17-CA-25030, 2011 NLRB GCM LEXIS 34, at *1-2 (July 19, 2011).

³⁸ *Id.*

These cases seem to indicate that the NLRB is less concerned with whether the employee used social media than with the underlying purpose of those actions.³⁹ Independent of social media use, the NLRB looks to whether an employee's conduct satisfies the elements of collective action. Because the relevant conduct is not collective in nature, most Facebook firings or Twitter terminations in the course of business are beyond protection under the NLRA.

IV. SOCIAL MEDIA POLICIES THAT DO NOT CHILL SECTION 7 ACTIVITIES

One concern with social media is that every employee has the ability to represent the business online, independent of the employer's wishes or control. In response, many employers create guidelines and disseminate a social media policy. Employers must proceed carefully to ensure that such policies do not chill, or even potentially chill, collective action activities.⁴⁰

An employer's guidelines constitute an unfair labor practice if "the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."⁴¹ Both explicit as well as implicit limits on employees' Section 7 rights to collective action are unlawful.⁴² The NLRB notes in its report on social media cases:

First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it is unlawful only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union

³⁹ See generally OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011).

⁴⁰ The N.L.R.B.'s Office of the General Counsel recently released an internal memorandum regarding social media policies, including multiple analyses and examples. MEMORANDUM OM 12-59 (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>.

⁴¹ Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

⁴² Martin Luther Mem'l Home, Inc. (*Lutheran Heritage*), 343 N.L.R.B. 646, 647 (2004).

activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.⁴³

This rule advises employers to be cautious and specific in drafting social media policies, but more importantly to be tactful and deliberate when enforcing or invoking the policy.

The language of a social media policy cannot be phrased so as to discourage protected activity.⁴⁴ Even after drafting an enforceable social media policy, an employer must look to the specific facts of an incident to determine whether wielding that policy would restrict collective action.⁴⁵ But the NLRB acknowledges that employers do have a legitimate interest in preventing the disclosure of confidential information and maintaining order and discipline in the workplace.⁴⁶ The following cases illustrate the limitations to an enforceable social media policy.

A. *Social Media Policy Too Restrictive*

Without naming the case, General Counsel for NLRB discussed in his report an employer's blogging and Internet policy that prohibited employees from making disparaging remarks about the company or supervisors or depicting the company in the media without permission.⁴⁷ The NLRB held that this social media policy was too broad and thus unenforceable.⁴⁸ Citing *University Medical Center*,⁴⁹ the NLRB found the first policy unlawful because it "contained no limiting language to inform employees that it did not apply to Section 7 activity."⁵⁰ The second policy concerning media

⁴³ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 12 (2011).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Rafael Gely and Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 312 (2007).

⁴⁷ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 6 (2011).

⁴⁸ *Id.*

⁴⁹ 335 N.L.R.B. 1318, 1320-22 (2001).

⁵⁰ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING

depictions unlawfully prevented employees from posting pictures of protected activities.⁵¹

B. Heated Language Still Protected as Concerted Action

General Counsel for NLRB's report also discussed an employee handbook containing a rule against inappropriate discussions about the company, management, or coworkers.⁵² The employer invoked this rule to terminate an employee for Facebook posts that used foul language to criticize the employer's administration of state income tax.⁵³ The NLRB found this policy and the discharge unlawful because it "could reasonably be interpreted to restrain Section 7 activity."⁵⁴ Although the heated language was not a response to any unfair labor practice, the NLRB found that the place, subject matter, and nature of the outburst favored the terminated employee.⁵⁵ The NLRB was particularly disapproving of the employer's use of litigation as a threat.⁵⁶ Because the policy could potentially chill collective action, the NLRB found the policy unlawful.⁵⁷

C. Violation of Employer's Code of Conduct

In *Rural Metro*,⁵⁸ a dispatcher criticized her employer and the allocation of federal grants in response to a Facebook post made by her United States Senator. In her post, she referenced an incident "where the volunteer fire fighters/first responders didn't even know how to perform CPR," disclosing information considered confidential by the employer according to the terms of its code of

GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 6 (2011).

⁵¹ *Id.* at 10.

⁵² *Id.*

⁵³ *Id.* at 10-11.

⁵⁴ *Id.*

⁵⁵ *Atlantic Steel*, 245 N.L.R.B. 814, 816 (1979).

⁵⁶ OFFICE OF THE GENERAL COUNSEL, NLRB, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 10 (2011).

⁵⁷ *Id.* at 11.

⁵⁸ No. 25-CA-31802, 2011 NLRB GCM LEXIS 30, at *1-2 (June 29, 2011).

ethics and business conduct policy.⁵⁹ Again, although the post referred to terms and conditions of employment (wages in this case), the post did not relate to previous or prospective collective action and was therefore not protected under the act.⁶⁰ Because of this, the NLRB found that the violation of the employer's policy was an independent reason for termination that did not violate the NLRA.⁶¹

CONCLUSION

For an employee's use of social media to be protected under the NLRA as collective action, it must be concerted and made for the purpose of mutual aid or protection. In the context of social media, a post, blog, or tweet is concerted if it relates to prior or prospective collective action. However, if the employee's use of social media is sufficiently opprobrious, protection under the NLRA is lost. An employer remains free to terminate for other legitimate reasons unrelated to collective action. Lastly, an employer may not distribute or enforce a social media policy which chills or potentially chills collective action.

PRACTICE POINTERS

- Both employers and employees should utilize privacy settings as a means of limiting conversations with coworkers when appropriate.
- Employers should clearly delineate work and non-work social media accounts and their use.
- If utilizing social media for the purpose of collective action, employees should make deliberate use of privacy settings.
- As a general rule, online rants against an employer are unlikely to qualify for protection as collective action.

⁵⁹ *Id.* at *2.

⁶⁰ *Id.* at *3.

⁶¹ *Id.* at *4.

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